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December 28, 2018

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

Re: *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141

Dear Ms. Dortch:

In their comments and reply comments, AT&T and others demonstrated that USTelecom's Petition[1] should be granted because the Section 251 requirements at issue are no longer necessary to protect consumers or competition. Since the comment round, opponents of the Petition have largely focused on the resale and UNE loop requirements. A group of resellers—Granite, MetTel, and Access One (the "Joint Parties")—have filed an *ex parte* letter asking the Commission to retain the Section 251(c)(4) "avoided cost" resale requirements.[2] Sonic, a facilities-based CLEC, has filed two letters in support of the Section 251(c)(3) UNE loop obligations, and has also apparently generated a letter-writing campaign amongst its customers that has thus far resulted in over 3,700 submissions. As explained below, none of these efforts makes a case for retaining any of the outdated, TDM-focused local competition mandates from which USTelecom has sought forbearance.

The Joint Parties' central premise is that POTS voice services should be analyzed as a distinct product market, separate from other retail data and voice services, because POTS lines are supposedly the "gold standard" for sending "large faxes," and also because they are "self-powered," which Joint Parties' argue make them uniquely suitable for "medical alerts, fire/sprinkler monitoring, gas pipeline monitoring, bank vault or burglar alarms, and elevators."[3]

[1] Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks, WC Docket No. 18-141 (May 4, 2018) ("Petition").

[2] Letter from Thomas Jones, *et al.*, to Marlene H. Dortch, FCC, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141 (Nov. 8, 2018) ("Joint Parties *Ex Parte*").

[3] Joint Parties *Ex Parte* at 2-3.

The Joint Parties claim that businesses do not consider more modern IP-based services to be viable alternatives to POTS lines for these functions, and that the Commission should retain the avoided-cost resale requirements as a way of preserving these TDM-based options indefinitely.

These arguments do not withstand a reality check. Legacy POTS voice services clearly face intense competition from myriad competitive alternatives. As the USTelecom Petition demonstrated, most consumers and businesses have *already* substituted away from POTS to far more robust alternatives. *See, e.g.*, Petition at 8 ("[O]nly 11 percent of U.S. telephone households are projected to have ILEC switched landline voice service by the end of this year, continuing a steady and unabating decline from 93 percent in 2003."); *id.* at 11 (demonstrating that competitive alternatives for business services, like Ethernet, have rendered "'obsolete' the TDM services [(*e.g.,* POTS voice)] . . . and the rapid growth of cable alternatives is 'the most dramatic change in the market over the past decade.'"); *id.* at 11-12 ("to a large extent in the [business data services] market, the competition envisioned in the 1996 Act has been realized" (quoting Report and Order, *Business Data Services in an Internet Protocol Environment*, 32 FCC Rcd. 3459, 3461 ¶ 5 (2017) ("*BDS Order*")). Contrary to the Joint Parties' arguments, IP-based services can send long faxes, and can remain powered during outages using battery backups, generators and other solutions. This evidence confirms that today's more modern IP-based services are substitutes for POTS.

Given the intense, facilities-based competition in this marketplace, continued application of "avoided cost" resale requirements—on only one set of competitors (ILECs)—is not necessary to protect consumers or competition. To the contrary, these regulations distort the competitive marketplace by, among other things, creating disincentives for ILECs and CLECs to invest in next-generation facilities. Accordingly, adopting the Joint Parties' arguments could serve no purpose other than to *slow* the transition away from POTS voice services to next generation IP-based services, in direct conflict with the Commission's policy of encouraging the transition to broadband.[4] The Joint Parties are clearly not seeking to protect consumers or competition, but only their own corner-case business strategies.[5]

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[4] *See, e.g.*, Second Report and Order, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, (June 8, 2018) ("*Accelerating Broadband Deployment Order*").

[5] Of course, resale will remain available after forbearance under Section 251(b), at market-based prices rather than the statutory, avoided-cost discount determined by state commissions. Equally important, the Joint Parties rely overwhelmingly on commercially negotiated UNE-P replacement services rather than avoided-cost resale anyway. *See* AT&T Reply Comments at 22-23 (citing Granite Comments at 25 and MetTel Comments at 11). CLECs have been competing successfully in the marketplace with UNE-P replacement services for more than ten years, and those

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Given these marketplace realities, the Joint Parties' specific arguments for keeping the resale requirements are without merit. First, they claim that the Commission is required to apply the "traditional market power" test applied in the 2009 *Qwest Phoenix Order*,[6] but the D.C. Circuit has specifically rejected that argument, holding that Section 10 "imposes no particular mode of market analysis or level of geographic rigor."[7] Second, the Joint Parties argue that the Commission should define the product market as legacy TDM services (because of their supposed "distinct" features), but the fact that business customers have switched to more modern IP-based services in enormous numbers confirms that such IP-based services are substitutes for the TDM services at issue and should be included in the competitive analysis. Third, the Joint Parties claim that forbearance will harm competition, but given that robust facilities-based competition now exists, any regulation of wholesale pricing would affirmatively harm competition by distorting pricing signals and deterring investment, in direct conflict with the Commission's policies to promote the transition to next-generation IP-based services. Moreover, as further explained below, in making these arguments, Joint Parties substantially mischaracterize Granite's recent negotiation with AT&T for an extension to its Local Wholesale Complete service agreement.

Sonic argues the Commission should keep the Section 251(c)(3) UNE loop requirements, because they allegedly create incentives for investment in fiber facilities. Of course, ILECs have committed to offer access to loops at commercial rates after forbearance, so CLECs like Sonic can continue to use copper loops. But Sonic's basic theory of incentives is backwards: regulated access to loops inevitably creates severe *disincentives* for investment by encouraging CLECs' reliance on copper. As Sonic effectively concedes, it is the impending demise of TDM networks—and the UNE regime with them—that is spurring CLECs like Sonic to deploy fiber. In any case, most of the UNEs Sonic purchases are in areas the Commission has already deemed competitive for legacy copper-based services. Finally, the letter-writing campaign Sonic has orchestrated among its customers has backfired. The letters actually demonstrate that most customers have *switched* from either the ILEC or cable to go to Sonic and are not using the UNE-based products Sonic claims are indispensable for competition.

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commercially negotiated services will remain available if the Commission forbears from the resale requirements.

[6] Memorandum Opinion and Order, *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd. 8622 (2010) ("*Qwest Phoenix Order*").

[7] *Earthlink, Inc.* v. *FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006) (emphasis added).

I. THE COMMISSION SHOULD FORBEAR FROM THE RESALE OBLIGATIONS OF SECTION 251(C)(4).

The Joint Parties' letter is focused entirely on avoided-cost resale provided to business customers. They make three broad claims: (1) the Commission is required to analyze USTelecom's forbearance request by applying the *Qwest Phoenix Order*'s market power test on a market-by-market basis, which they say precludes nationwide relief; (2) under that test, the Commission must also analyze legacy TDM services sold to businesses as a separate, stand-alone product market; and (3) forbearance from the avoided-cost resale obligations will harm competition for business services and would provide no significant benefits. Each of these claims is incorrect.

A. The Commission Should Grant Nationwide Forbearance From The Section 251(c)(4) Resale Obligations.

The Joint Parties argue that the FCC is *required* to apply the market power test used in the *Qwest Phoenix Order*. They also claim that this test prohibits nationwide forbearance, and that the Commission must instead assess competition in individual geographic markets. Joint Parties *Ex Parte* at 6-10.

The courts have already rejected the Joint Parties' position. The D.C. Circuit has held specifically that the Commission has substantial discretion to determine what analytical approach it will use in evaluating any particular forbearance petition.[8] As the court explained, Section 10 "imposes no particular mode of market analysis or level of geographic rigor."[9] Accordingly, the statute does not require the Commission to use any particular test, including the *Qwest Phoenix Order* test; rather, the Commission may choose its analytical approach on a case-by-case basis. This also means that the Commission is free to grant forbearance on a nationwide basis, as long as it explains its basis for doing so.[10]

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[8] *Earthlink*, 462 F.3d at 8. Indeed, the FCC acknowledged this point in the *Qwest Phoenix Order* itself: as AT&T noted, the Commission's mode of analysis in the *Qwest Phoenix Order* represented a change in approach from earlier orders, like the *Qwest Omaha Order*. *See* AT&T Reply Comments, *Petition of USTelecom for Forbearance from Section 251(c) Unbundling and Resale Requirements and Related Obligations, and Certain Section of 271 and 272 Requirements*, WC Docket No. 18-141, at 11-12 (Sept. 5, 2018) (citing *Qwest Phoenix Order* ¶ 24) ("AT&T Reply Comments").

[9] *Earthlink*, 462 F.3d at 8.

[10] *See also U.S. Telecom Ass'n* v. *FCC*, 825 F.3d 674, 728-29 (D.C. Cir. 2016) (upholding Commission's nationwide forbearance from all Section 251 requirements for broadband internet

After several pages of argument, the Joint Parties eventually acknowledge these key D.C. Circuit holdings. Joint Parties *Ex Parte* at 9-10. They concede, as they must, that the Commission does not have to apply the *Qwest Phoenix Order* test as long as it explains its reasoning. At the end of the day, therefore, their real argument is that the ILECs have "provided no basis" for using an approach other than the one in the *Qwest Phoenix Order*. *Id*. at 10.

In fact, the record amply demonstrates the basis. The ILECs' legacy copper-based services today make up a small and rapidly shrinking share of the local voice marketplace.[11] The vast majority of services provided over traditional POTS lines have migrated to wireless and broadband wireline networks. That transition has occurred on a nationwide basis. Given that copper POTS lines have such small market shares—and that those shares continue to decline irreversibly—there is no need to conduct a *Qwest Phoenix Order* market analysis as if there were a genuine question as to whether any given ILEC might still be a dominant provider of any relevant services.[12] The data and level of analysis in USTelecom's Petition are more than adequate to support nationwide forbearance of the resale provisions on today's facts.

Even if the Commission were bound to apply prior forbearance precedents, the Joint Parties mischaracterize those precedents. The Joint Parties argue (at 7-8) that the Commission has established "separate analytical frameworks" for forbearance from requirements relating to advanced services versus legacy TDM facilities. They claim the Commission must use the "traditional market power" framework when legacy TDM facilities are at issue (as in the *Qwest Phoenix Order*). By contrast, they argue nationwide forbearance is appropriate only for broadband services, because "in those cases, the Commission's Section 10 analysis was informed by Section 706's directive that the Commission seek to promote broadband deployment through

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access services; petitioners "cannot rope Section 251's [local, market-by-market] requirements into the Commission's section 10 analysis"). *See also* Report and Order on Remand, Declaratory Ruling, and Order, *Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, 5612, ¶ 37 (2015) ("Today, our forbearance approach results in over 700 codified rules being inapplicable").

[11] *See* Petition at 8; AT&T Reply Comments at 8.

[12] *Cf. Earthlink*, 462 F.3d at 8. Even if there were isolated areas where ILEC copper services remained prevalent, nationwide relief would still be warranted. As the Commission has explained in a related context, even if granting forbearance would "leave a relatively small percentage of [areas] price deregulated and without the immediate prospect of competitive [alternatives]," "greater harm – primarily manifested in the discouragement of competitive entry over time – would result if we were to attempt to regulate these cases than is expected under our deregulatory approach." *BDS Order*, ¶ 92 (internal quotations omitted).

forbearance." Joint Parties *Ex Parte* at 7. Under the Joint Parties' reading of the cases, the traditional market power analysis must apply here, because "Section 706 does not apply to the instant Petition" involving legacy TDM services. *Id.* at 8.

Both premises of the Joint Parties' arguments are wrong. The Joint Parties' first premise—that the Commission has always used the "traditional market power framework," and geographically granular analysis, for petitions seeking forbearance from "economic regulation of legacy [TDM] services"—is incorrect. Joint Parties *Ex Parte* at 6-8. The Commission has granted nationwide forbearance from the local-competition provisions applicable to legacy services on multiple occasions.[13]

The Joint Parties' other premise—that Section 706 does not apply to this petition—is also incorrect. The promotion of broadband deployment is a central issue in this proceeding. Outdated regulations like avoided-cost resale encourage continued dependence on legacy networks, which creates disincentives for broadband deployment in the same way that excessive regulation of advanced services does.[14] Accordingly, "Section 706's directive . . . to promote broadband deployment through forbearance" is just as relevant to the "Section 10 analysis" here as it was in cases involving direct regulation of advanced services. *Cf.* Joint Parties *Ex Parte* at 7.

B. The Relevant Product Market Includes All Local Services, Not Just Legacy POTS Service Over TDM Networks.

Purportedly applying the incorrect standard from the *Qwest Phoenix Order*, the Joint Parties argue that USTelecom's Petition does not adequately define the *product* market. Faced with overwhelming evidence that TDM services represent only a small and shrinking portion of the marketplace, the Joint Parties attempt to re-define the relevant market as *only* legacy POTS service provided over copper loops. *See* Joint Parties *Ex Parte* at 13-14. The Joint Parties spend

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[13] *See, e.g.*, Memorandum Opinion and Order, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks*, 31 FCC Rcd. 6157, 6242 (2015); Memorandum Opinion and Order, *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, 28 FCC Rcd. 7627 (2013); *Earthlink*, 462 F.3d at 6 ("FCC extended the same § 251 unbundling relief to fiber-to-the-curb (FTTC) loops (*i.e.*, hybrid loops in which fiber runs nearly, but not all the way, to the customers' premises) and loops to multi-dwelling units.").

[14] Indeed, the Joint Parties' central theme is that avoided-cost resale is necessary to preserve POTS service over legacy copper lines indefinitely. *See, e.g.*, Joint Parties *Ex Parte* at 5.

much of their letter arguing that legacy POTS service has such special, irreplaceable characteristics that businesses simply will not even consider more modern, next-generation services as a possible substitute. *See id.* at 2-5, 13-14, 17-18.

This is nonsense. As discussed above, business customers are clearly dropping POTS service provided over copper lines for more modern Ethernet and IP-enabled services provided over fiber, cable, and wireless networks on a massive scale.[15] In virtually all cases, business customers' overwhelming reliance on more modern alternatives today represents a substitution *away* from legacy copper services that they used to purchase. Legacy POTS services are clearly in the same product market with other voice services provided over more modern networks.

The Joint Parties' claim that legacy POTS service is "irreplaceable" boils down almost entirely to the fact that such services, to the extent they are provided over copper loops, are line-powered. *See* Joint Parties *Ex Parte* at 2-3. The Joint Parties claim that this feature of legacy TDM services makes them uniquely and irreplaceably suited to certain types of business functions, such as alarm systems.[16] Because of these "distinct characteristics," the Joint Parties argue that "business customers do not perceive other voice services as viable alternatives to traditional TDM services." Joint Parties *Ex Parte* at 2; *see also id.* at 13.

The mere fact that legacy TDM services have "distinct characteristics" does not mean that customers do not view IP-based services as substitutes. Although it is true that twenty-first century broadband networks are not line-powered the way twentieth-century, copper-based networks were, it is frivolous to suggest that this feature of copper networks will save them from extinction. As modern IP-based services replace legacy TDM services, business customers of all types are readily adapting to the characteristics of broadband networks. As the Joint Parties themselves acknowledge, customers today can (and do) use batteries and generators to ensure that IP-based broadband services do not lose power, to the extent the functions at issue are mission-critical. *See* Joint Parties *Ex Parte* at 5.

At bottom, the Joint Parties' argument is an anachronistic plea to preserve TDM networks indefinitely—which flies in the face of both Commission policy and competitive reality. The

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[15] *See* Petition at 8-10.

[16] *Id*. The Joint Parties also claim that traditional TDM services are the "gold standard" for reliably sending faxes. *Id.* at 3. IP-based broadband systems can obviously handle the transmission of documents and other data, often with greater functionality than legacy POTS lines. The supposed superiority of POTS lines for sending faxes is not an adequate reason to retain outdated regulations for the purpose of trying to preserve copper networks, which would otherwise be retired.

Joint Parties' discussion of the Commission's recent *Accelerating Broadband Deployment Order* illustrates their basic confusion.[17] As CenturyLink has noted, that order permits streamlined discontinuance of legacy service if there is an interconnected VoIP service and one other facilities-based voice service in the affected area—a rule that clearly assumes that more modern IP-based services are substitutes for copper service.[18] The Joint Parties have no answer but to collaterally attack this "alternative options" rule, complaining that the Commission "did not undertake a substitution analysis." Joint Parties *Ex Parte* at 14. But the *Accelerating Broadband Deployment Order* dramatically confirms both that the retirement and discontinuance of copper services is well underway, *and* that the Commission's policy is to encourage that transition, not to try to stop it. Forbearance would further those policies as well.

C. Retention of the Resale Requirements Would Harm Competition.

Much of the Joint Parties' letter argues that forbearance will somehow harm competition. Joint Parties *Ex Parte* at 15-27. Of course, the embarrassing fact for the Joint Parties is that CLECs purchase very few avoided-cost resale lines, because CLECs generally favor commercially negotiated UNE-P replacement services that are offered completely outside the Section 251 framework.[19] Nonetheless, the Joint Parties argue that avoided-cost resale remains necessary as a check on commercial negotiations for UNE-P replacements, and argue that Granite's recent negotiations with AT&T are an example of this influence.

The truth is that *retaining* the resale requirements would harm competition and retard the transition to broadband. The forbearance standard, and competition policy more generally, is focused on ensuring competitive outcomes for consumers.[20] As the Petition shows, voice and data services today are fiercely competitive at the retail level. Multiple facilities-based competitors offer voice and data services to consumers today, including wireline broadband, cable broadband, and wireless providers. As of 2018, this ubiquitous *facilities-based* competition ensures competitive prices and efficient services for consumers.

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[17] *See* Joint Parties *Ex Parte* at 14 (discussing *Accelerating Wireline Broadband Deployment Order*).

[18] Reply Comments of CenturyLink, *Petition of USTelecom for Forbearance*, WC Docket No. 18-141, at 13 (Sept. 5, 2018); *see* Joint Parties *Ex Parte* at 14.

[19] *See* AT&T Reply Comments at 22-23.

[20] *See* Petition at 21-23; 47 U.S.C. § 160(a).

Once consumers have multiple facilities-based options, there is no need for price regulation of wholesale inputs.[21] To the contrary, once sustainable, facilities-based competition has developed, such wholesale regulation becomes affirmatively harmful. Prices determined by regulators have substantial error costs. Regulators have imperfect information and often set regulated prices at incorrect levels. For example, in any instance in which regulators have set the "avoided-cost" discount too high—resulting in wholesale rates that are too low—such rates have a substantial negative impact on competition. Incorrect pricing signals would encourage competitors to increase their reliance on these outdated, legacy facilities, which in turn creates disincentives for broadband investment.[22]

The Joint Parties thus have things backwards when they argue that avoided-cost resale is necessary to constrain commercial negotiations for UNE-P replacement services. *See* Joint Parties *Ex Parte* at 19. Any regulated rate in the marketplace has the potential to impact commercial negotiations for those services. But in a competitive marketplace, there is no need for such regulated rates, because the marketplace sets the rate that produces the greatest benefits for consumers and competition. Therefore, unless the regulated rate is set at exactly the competitive rate—which almost never occurs—the existence of the regulated rate could only harm consumers and competition. In short, once facilities-based retail competition ensures competitive outcomes for consumers (as is the case here), any regulatory intervention aimed at wholesale inputs can only subsidize individual competitors, at the expense of competition and investment.

Section 251(c)(4) also indisputably imposes significant costs on carriers and regulators, as AT&T and others showed, which includes the costs associated with setting the rates in state commission proceedings. *See* AT&T Reply Comments at 24. The Joint Parties' response is to claim that there are no such costs because state commissions generally have not revisited the avoided-cost discount over the last fifteen years. *See* Joint Parties *Ex Parte* at 26-27 & n.132. But that fact cuts the other way: rate determinations that have not been revisited in fifteen years are almost certainly wrong now, which increases the chances that such regulation is distorting market outcomes in harmful ways, as described above.

For all of these reasons, Granite's claim that it was able to leverage the avoided cost regulations to extract lower rates for AT&T's commercial UNE-P replacement production (Local Wholesale Complete ("LWC"))—even if true, which it is not—would only demonstrate that

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[21] *See, e.g., USTA* v. *FCC*, 359 F.3d 554, 582 (D.C. Cir. 2004) (existence of "robust intermodal competition" renders wholesale access unnecessary, because "mass market consumers will still have the benefit of competition" even if all CLECs are driven from the market).

[22] *See, e.g., BDS Order* ¶ 25.

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these regulations are indeed distorting the marketplace to the detriment of consumers and competition. *See* Joint Parties *Ex Parte* at 20-22. In any case, Granite's assertions are not accurate.

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II. THE COMMISSION SHOULD FORBEAR FROM THE SECTION 251(C) REQUIREMENT TO OFFER UNBUNDLED ACCESS TO LOOPS.

Another commenter, Sonic, has filed two letters urging the Commission to keep unbundled access to UNE loops.[23] Sonic argues that the current UNE loop requirements create "exactly the right incentives" for both CLECs and ILECs to invest in fiber.[24] Sonic has also apparently orchestrated an *ex parte* letter writing campaign among its customers urging retention of the UNE loop requirements. Neither of these efforts supports Sonic's case.

Sonic's letters argue that UNE loops promote fiber deployment because CLECs like Sonic use UNE loops as a "bridge to fiber."[25] Sonic claims that it enters a market by purchasing UNE loops, and after establishing a customer base it deploys fiber.[26] Sonic argues that eliminating unbundled access to loops "would put the brakes on or end this fiber deployment by Sonic and others" that pursue this strategy.[27]

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[23] Letter from Julie A. Veach, representing Sonic Telecom LLC, to Marlene H. Dortch, FCC, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141 (Nov. 29, 2018) ("Sonic 11/29/18 *Ex Parte*"); Letter from Julie A. Veach, representing Sonic Telecom LLC, to Marlene H. Dortch, FCC, *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, WC Docket No. 18-141 (Oct. 15, 2018) ("Sonic 10/15/18 *Ex Parte*").

[24] Sonic 10/15/18 *Ex Parte* at 2.

[25] Sonic 11/29/18 *Ex Parte* at 3. Sonic latest letter also contains a lot of rank hyperbole about how important this CLEC fiber deployment will be for 5G. *Id.* at 2-3 ("granting the Petition . . . would, therefore, also harm the country in the race to 5G.").

[26] Sonic 11/29/18 *Ex Parte* at 2-3; Sonic 10/15/18 *Ex Parte* at 1.

[27] Sonic 11/29/18 *Ex Parte* at 3.

The short answer to this argument is that AT&T and other ILECs have committed to continue to offer a UNE-loop product at commercial rates after forbearance is granted. Contrary to Sonic's claim, forbearance would not end unbundled access to loops; it would merely end *regulated* access to those loops at TELRIC rates, and the harms associated with such regulations. Thus, even if it were true that CLECs need UNE loops as a "bridge to fiber," those CLECs will still have access to such loops.

But Sonic's argument about incentives is wrong for other reasons as well. First, UNEs have become competitively irrelevant. Again, myriad competitors have *already* deployed fiber and other next-generation facilities-based networks throughout the United States. As USTelecom's Petition shows, legacy TDM networks represent only a small portion of today's marketplace, and carriers using UNE loops represent an exceedingly small percentage of the total number of connections to consumers.[28] In today's environment, much larger market forces are driving deployment of next-generation facilities. Regulated access to UNE loops, aimed at the outdated and disappearing copper network, is no longer necessary (or even relevant) to promote fiber investment.

Second, Sonic is confusing two different types of incentives. On the one hand, *regulated* access to UNE loops, to the extent that such access is mandated at below-market prices, unambiguously creates *disincentives* to build fiber networks, because such regulated access encourages CLECs to remain on UNE-based services. On the other hand, Sonic—unlike the Joint Parties—recognizes that TDM networks are being retired. Acknowledging this, Sonic states that "the current rules incentivize CLECs like Sonic to invest continually in fiber in anticipation of copper retirement."[29] In other words, Sonic concedes that it is the ongoing *demise* of copper networks—and with them any possibility of access to unbundled network elements—that is driving Sonic and other CLECs to build fiber alternatives. Forbearance could only further intensify those incentives for investment, consistent with the Commission's ongoing technology transition policies.

Third, the data show that Sonic is operating almost exclusively in areas that already have multiple facilities-based competitors. Sonic has already admitted that "cable operators and other

[28] *See* Petition at 8 ("non-ILEC switched access services over ILEC-provisioned UNE loops account for *less than two percent* of all fixed lines," and "*less than one-half of one percent* of all connections" when wireless lines are added) (emphasis in original); *see id*. at 7-19.

[29] Sonic 10/15/18 *Ex Parte* at 2.

CLECs operat[e] in Sonic's service areas."[30] More pointedly, Sonic's CEO recently acknowledged that "[o]ur competition is mainly Comcast and AT&T," and that "[a]ll of the territories we work in there will be an incumbent telco and incumbent cable operator and *generally we're the third or fourth provider in a market*."[31] This is further confirmed by AT&T's internal data, which show that approximately [redacted] of the UNE loops that Sonic purchases from AT&T are in are counties that the Commission has already found to be subject to facilities-based loop competition in the *BDS Order*.[32] The forbearance standard requires the Commission to focus on the public interest, and the promotion of competition and consumer welfare, not the desires of individual competitors. Consumers can already choose between multiple facilities-based competitors, and nothing about Sonic's situation supports the notion that UNEs are necessary to ensure that consumers have access to next-generation, fiber-based services.[33]

Finally, Sonic's consumer-letter-writing campaign has also largely backfired on Sonic. If anything, these letters support granting the Petition, not denying it. By AT&T's count, Sonic's campaign has resulted in more than 3,700 submissions. Although these letters generally oppose forbearance, their substance either provides no basis for denying forbearance or, for the most part, confirms that forbearance is required.

To even remotely support opponents' arguments, these letters would have to establish that the letter-writer actually relies on a product covered by Section 251(c)—*i.e.*, a UNE-based

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[30] Opposition of Sonic Telecom, LLC to Petition of Forbearance of USTelecom, at 15 (August 6, 2018).

[31] Fierce Telecom (December 4, 2017) (emphasis added).

[32] In other words, almost all of the UNE loops Sonic purchases from AT&T are in areas that are so competitive with respect to the deployment of fiber loops that the Commission felt justified in removing all *ex ante* rate regulation—a judgment that the Eighth Circuit upheld. *Citizens Telecomm. Co. of Minn.* v. *FCC*, 901 F.3d 991 (8th Cir. 2018). As AT&T has previously explained, the *BDS Order* represents the Commission's considered judgment about where regulation of ILEC business data loops remains warranted today, based on an extraordinarily granular set of competitive data. AT&T Reply Comments at 13-19; *see also BDS Order* ¶ 86 (remaining price caps govern not only DS1s and DS3s, but also all other non-packet-based services in the special access basket, including "voice grade services").

[33] In addition, as AT&T has noted, a number of forbearance opponents have claimed that UNE loops remain necessary to ensure competition in rural areas. Sonic's deployment provides no support for that proposition either: according to AT&T's data, Sonic purchases a grand total of [redacted] (DS0 analog) in an AT&T rural area.

service—and that they lack competitive alternatives. These letters establish neither proposition. Most (more than 60%) of the letters filed by Sonic customers do not state whether they are purchasing Sonic's fiber or UNE-based service, and thus provide no support for Sonic's position.

Equally important, of the letters that do identify which Sonic service they purchase, about 70% of them state that they are purchasing Sonic's *fiber* service, not the UNE-based services that Sonic claims these customers desire. Moreover, nearly half of these letters expressly mention that the customer had switched to Sonic from another facilities-based service, which further undermines Sonic's claims that UNEs continue to be critical to ensuring customer choice and competition. Thus, to the extent the Commission relies on those letters at all, it must recognize that, on balance, their substance supports a grant of forbearance.

Sincerely,

James P. Young

Counsel for AT&T